

## CEPOA-RD MEMORANDUM FOR RECORD



SUBJECT: POA-2003-803 Koktuli River, Pebble Limited Partnership,  
Meeting Notes for August 13, 2010 USACE/USEPA/Six Tribes meeting

### SUMMARY:

Attendees: Dave Casey, Kenai Regulatory Field Office Supervisor  
Katie McCafferty, Regulatory Project Manager  
Rob Stolzman, USACE Office of Counsel  
Amanda Shearer, USACE Tribal Liaison  
Tami Fordham, USEPA Tribal Liaison  
Phil North, USEPA, Kenai Peninsula  
Mark Jen, USEPA, Anchorage  
Patty McGrath, USEPA, Seattle  
Cara Steiner-Riley, USEPA Counsel, Seattle (via phone)  
Jeff Parker, Counsel for six Tribes  
Thomas Tilden, First Chief Curyung Tribal Council

In a letter dated May 21, 2010, Jeff Parker, the legal representative for a consortium of six federally recognized Tribes (Curyung Tribal Council, Native Village of Ekuk, New Koliganek Village Council, Levelock Village, New Stuyahok Village, and Nondalton Village), requested a meeting with USACE and USEPA to discuss various issues. The following is a summary of the meeting discussion.

### 1. Introductions

Each attendee introduced themselves and spoke of their role and responsibility as regards to the Pebble project. USEPA stated that there is currently no mining coordinator assigned to the Pebble project. A sign-in sheet was passed around. [The sign-in sheet is attached to this memorandum, labeled Attachment 1.].

### 1.1. Changes/additions to agenda

On August 12, 2010, an agenda was sent out by Mr. Parker. No changes to the agenda were proposed. [The agenda is attached to this memorandum, labeled Attachment 2.].

### 2. Explanation of the Corps Regulatory Program

USACE handed out a paper copy of an eight slide presentation. USACE explained the history of the USACE, its roles in Alaska, and its mission and goals. USACE drew attention to the Six Principles Guiding USACE Activities

with respect to Tribes and noted that the last of the six bullets is less relevant to the Regulatory Program. [The handout is attached to this memorandum, labeled Attachment 3.]

### 3. Explanation of EPA's authorities

USEPA stated that, while they had not brought a handout, they would send out a copy of the presentations made to the Tribes in the Mining 101 training for Tribes.

Under Section 404 of the Clean Water Act, USEPA oversees the application of the 404(b)(1) guidelines and can object to a project under Section 404(q)<sup>1</sup> or veto a project under Section 404(c). Under the NEPA regulations, USEPA can also be a cooperating agency.

Section 309 of the Clean Air Act requires USEPA to review and rate EISs for their assessment of environmental impacts and the adequacy of the impacts.

Under Section 402 of the Clean Water Act, USEPA has the authority to issue NPDES permits, but they are currently in the process of transferring that program to the State of Alaska. Also under Section 402 of the Clean Water Act, USEPA has enforcement authority. In response from a question from Mr. Parker, USEPA will check to see if NEPA would be triggered if USEPA federalized a 402 permit.

USEPA also regulates the injection of wastewater into groundwater (UIC permits). This authorization process is not subject to NEPA. It is unknown if this authorization process is exempt from NEPA by statute, but Ms. Steiner-Reilly will check and report back.

Mr. Parker and Mr. Tilden pointed out the ability of Tribes to consult on permits is lost when the state is delegated a program because the State of Alaska (State) does not recognize a government-to-government relationship with Tribes, but the Tribes were consulted prior to USEPA delegating the programs. USEPA noted that there is an agreement with the state that any Tribe with a concern can contact USEPA, such a process used by the U.S. Fish and Wildlife Service. Mr. Parker requested a copy of that agreement.

### 4. Discussion of issues raised, implied, or relevant to May 2010 Letter, to Corps and EPA by Counsel to the Six Tribes

#### 4.1.1. Timing of USACE requests to potential cooperating agencies

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<sup>1</sup> The USACE explained any federal agency has the authority to elevate a project under 404(q). It was not known at the time of the meeting if Tribes have the right to request elevation under 404(q). \*USACE Post Meeting Note: 404(q) is procedure reserved for Federal agencies only.

Mr. Parker stated that early informational meetings about the potential to become a cooperating agency are helpful because Tribes require more time to make their decision. Among other things, the Tribes have transportation issues and language difficulties to overcome. Mr. Parker asked if the USACE could participate in the informational meetings planned by USEPA.

USACE expressed appreciation for the comment and the question. Despite our interest, we were prevented from participating in the informational meetings presented by USEPA due to funding issues. USACE understands that Pebble Limited Partnership (PLP) had committed to take the project description throughout the state for six months. We offered to consider using that opportunity to engage the Tribes in advance of the NEPA kick-off.

Mr. Tilden stated that it would be helpful to the Tribes to have six months to make their decision.

The Corps NEPA regulations only say that the cooperating agencies must be identified early, but they do not specifically speak to when. Because it is early in the process, USACE does not have a timeline established for sending out invitations to potential cooperating agencies, nor have we established a time limit for when that process must be completed. Although it is early, USACE anticipates being the lead federal agency, and we intend to be inclusive while trying to identify potential agencies that could have a role in the project. USACE suggested we may consider sending out a preliminary letter notifying Tribes project information could be forthcoming and include information about the EIS process. However, in our invitation for agency and Tribal participation, we are considering asking pointed questions so that we can best determine how agencies and Tribes can participate and who will be a cooperating agency or a commenting agency. We anticipate having a framework of factors so that both sides can determine how a potential cooperating agency or Tribe may participate.

It was generally agreed that it is in the best interest of the lead federal agency to bring on cooperating agencies early.

Mr. Parker suggested that it would be best if the invitation to be a cooperating agency is a separate short letter from all NEPA business so that we get the best response. He added, Tribes tend to be slower to respond when they have a stack of paper to deal with.

4.1.2. What are the potential EIS-related issues that USACE/USEPA/Tribal/other agencies might identify about which Tribes might help agencies and the public?

This is a large project with what USACE sees as four components, port, 90 mile road/utility corridor, power plant, and the mine, which would include the pit,

tailings dam and mill. Each component is large in and of itself. It is possible different Tribes may participate differently for each component or may focus their efforts on specific topics, just as federal and state agencies may participate differently. USACE anticipates Department of the Army permits will be needed across all components.

A Tribe's role under NEPA could be as a cooperating agency. Cooperating agencies do have more opportunities to review the document and to comment on it. In addition, cooperating agencies see the studies and have the opportunity to sit in on meetings. As cooperating agency, Tribes would provide comments. Being a cooperating agency is a big responsibility, requiring staff to attend meetings, review documents, provide cooperation, and to not identify some big issue late in the process.

USEPA and USACE have not yet been able to determine what their time commitment will be because it is so early in the process and such a big project. The third party contractor will do as much work as possible, but it takes staff to review the work. A Tribe may need a staff dedicated to the project. In addition, the Tribes may be able to obtain volunteer help from experts who would provide information for the EIS or to hire experts to review technical information. Alternatively, a group of Tribes may be able to designate a tribal association to act as their representative, which may lessen their individual time and resource commitment. A previous example of this was seen on a USEPA lead EIS for the Red Dog Mine outside of Kotzebue, AK ; the Maniilaq Association (a tribally operated non-profit health and social services organization in Northwest Alaska) was assigned by interested federally recognized Tribes to be a cooperating agency. The Tribes reserved their individual right to G-to-G consultation. Jackie Hill, the Maniilaq Tribal Association in Kotzebue, Nina Shestakovich, and Millie Hawley may be able to provide further information on the resources that were required for coordinating on the Red Dog EIS. USACE stated that we would have to get legal review from our headquarters prior to accepting a tribal association as a representative of a tribe who would be a cooperating agency. The Corps opined that there may be fewer hurdles to allowing this sort of mechanism since there was precedent with USEPA.

Opportunities to provide concurrence or non-concurrence will be laid out in the Memorandum of Understanding (MOA) between the lead federal agency and the cooperating agencies. The MOA will also lay out the timing and amount of time that will be given to cooperating agencies to respond to any request for concurrence. There are also no specified concurrence points identified in the regulations and each agency may handle the situation differently. The lead agency is not required to report on which agencies concurred.

A cooperating agency does not necessarily equal a consenting agency. Because NEPA is a disclosure law, not a decision maker, any cooperating agency can concur or not concur for any number of reasons.

#### 4.1.3 Are there field activities about which Tribes might help?

Although USACE believes that we are two years away from making decisions about how data will be collected, we do know that the information collection will be the responsibility of the third party contractor. In the NEPA process, third party contractors/experts are hired to collect information following a scientific process. While PLP will pay the contractor, USACE would write the qualifications required for the contractor, PLP would put out the request for proposals (RFP), and the USACE would make the selection from the resulting list.

The Tribes can provide information on any topic of interest to the third party contractor. There will be surveys done and the third party contractor may share information with interested Tribes to clarify information on the affected environment and context. It was suggested the lead federal agency would need to remember to talk to the tribal experts in the various subjects and not limit their discussions to the elected tribal officials. USEPA would suggest that information collected regarding subsistence follow a process which was used successfully on the Red Dog Mine EIS and resulted in a lot of useful information being collected in addition to subsistence information. As commenting agencies under NEPA, Tribes can suggest studies. Tribes can provide information on protocol and correct timing for contacting various members. Mr. Parker suggested that the third party contractor, while conducting surveys to collect data, may find that the Tribes, under a subcontract, can serve to facilitate intertribal communications.

Mr. Parker stated subsistence is not the only issue upon which Tribes may be able to provide useful comments and they are always willing to discuss additional items. USACE anticipates that Tribes could also help with cultural resources as the DA permits are subject to the National Historic Preservation Act. The Tribes may also be able to provide information about endangered species and other issues.

In NEPA documents, socioeconomic issues are also addressed, in addition to subsistence. This will provide the opportunity to address the potential effects of the influx of people into the region.

Mr. Parker stated according to NEPA regulations, there must be a "no action" alternative. USACE responded that our NEPA regulations define the "no action" alternative as permit denial and we do, as a standard practice, include and analyze the "no action" alternative in our environmental assessments and EISs.

#### 4.1.4. What sort of funding sources exist for work done by Tribes where work product may be of assistance to a NEPA process?

Mr. Tilden stated that the Tribes are scraping together money now, just to stay informed. Mr. Parker stated that the Tribes would want as much opportunity to take advantage of funding as early as possible.

USEPA pointed out that the GAP funds, which are used to build capacity within Tribes to respond to the NEPA process, cannot be used once a tribe begins to participate in a NEPA process.

PLP may be a source for financial assistance. (PLP has already contracted with Alaska Peninsula Corporation (APC), a merged village corporation, to help them conduct work in advance of the NEPA work.

USEPA stated that Alaska Department of Environmental Conservation (DEC) uses 319 grants to fund water quality sampling. In addition, Bureau of Indian Affairs and USEPA have funded the collection of water quality data

Other suggested contacts for potential funding included Department of the Interior, Polly Carr, Moore Foundation, The Nature Conservancy and Trout Unlimited.

Neither USACE nor USEPA can provide a letter of support for grant applications. And USACE can offer no financial assistance to any party.

#### 4.2 Joint Lead Agencies

Since no application has been submitted, the federal agencies have not met to decide on the lead agency. It is up to the federal agencies to decide among themselves who will be the lead agency.

USACE, U.S. Coast Guard, Federal Energy Regulatory Commission, U.S. Department of Transportation, and the Bureau of Alcohol Tobacco and Firearms may all have to issue some permit on some portion of the project. USACE agreed that we are most likely to be the lead agency. USACE would rely on PLP to list the permits that they will be required to obtain and use it to engage federal agencies in the discussion regarding the selection of the lead agency

NEPA does allow for joint lead agencies when the agencies have a substantial interest in the project.

USEPA would have to decide on being a lead when the appropriate time comes but anticipates that they will be a cooperating agency. Because USEPA has no permitting authority over Pebble project, it would be unprecedented for them to be a lead agency. USEPA believes their ability to oversee the Corps 404 program and their veto authority under Section 404(c) is not sufficient to trigger the lead role. USEPA has never been the lead where they had no permitting authority that would trigger NEPA.

Absent of other information, USACE believes that the section of the NEPA regulations (40 CFR part 1501.5) regarding a party who is substantially affected by the absence of a lead agency designation does not offer a process for said party, who is unsatisfied with the determination of the lead agency, to request the Council on Environmental Quality (CEQ) determine the lead or joint lead agencies.

USEPA stated that if an entity believes they are affected by who is the lead, they can ask for a co-lead. USEPA stated that they would need to ask for the correct interpretation of the joint lead agency regulation from the Council on Environmental Quality (CEQ).

#### 4.3 Closing Note

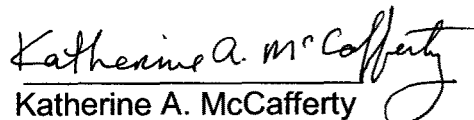
USACE stated that we would distribute draft minutes to all parties for review and collect comments and make corrections prior to memorializing the minutes in the file.

Mr. Parker summed the important points that he heard in the meeting.

- There may be a willingness to allow the Maniilaq model of tribal representation.
- All discussions of issues are in their early stages.
- Pointed questions will be used by the USACE to help Tribes decide whether to become cooperating agencies.
- Besides subsistence there are other issues upon which the Tribes might contribute, such as cultural resources.
- In addition, Mr. Parker wants to continue consultation under 404(c).

USEPA stated that building relationships early is good. How they will be involved in the NEPA process remains to be seen. USEPA will continue to share information about who to talk to for potential funding. USEPA reminded the group that the tribal liaisons are always available to help the Tribes.

DATE: December 3, 2010

  
Katherine A. McCafferty  
Project Manager

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COE/EPA / Jeff Porter NEPA/PEBBLE Mtg  
 1:30PM Friday August 13, 2010 Federal Bldg Rm 154

Sign-In

NAME	AGENCY/ORGANIZATION	Ph.
Dave Casey	COE	907.283.8519
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Jeff Porter	NEPA	907-222-6859
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Thomas Flood		

**Meeting with COE, EPA re Tribes as Cooperating Agencies  
on potential EIS on Pebble Mine**

Friday, August 13, 2010, 1:30 PM to 3:00 PM  
GSA Conference Room 154, Federal Building. (in or accessible from 1st Floor Atrium.)

An email seemed to indicate Ms. Steiner-Riley will need to tele-conference in.


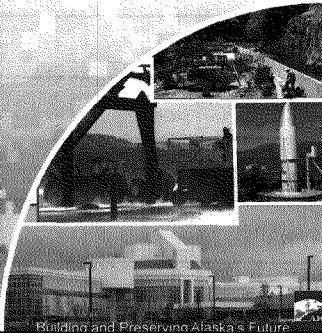
**Tentative Agenda per emails as of 10/12/10:**

1. Introductions
- 1.1 Changes/additions to agenda.
2. Explanation of the Corps Regulatory Program (10 minutes)
3. Explanation of EPA's Authorities (10 minutes)
4. Discussion of issues raised, implied, or relevant to May 2010 Letter, to Corps and EPA, by Counsel to the Six Tribes.
  - 4.1. NEPA and Cooperating Agency Status
    - 4.1.1. Timing of COE requests to potential cooperating agencies. Regulations favor as early as possible, before scoping. Does it help if the COE uses informational fora to create "informal" requests before formal requests are triggered by applications, so that Tribes have more time to consider their potential role. EPA seems to favor this approach by using informational meetings to allow Tribes more time to consider.
    - 4.1.2. What are the potential EIS-related issues that COE/EPA/Tribal/other agencies might identify about which Tribes might help agencies and the public?
      - 4.1.2.1. These questions from the six tribes may set context for identifying issues.
        - (a) What is the tribal staff commitment?
        - (b) What are the tasks Tribes would perform?
        - (c) What is the financial commitment of tribes and are grant funds available?
        - (d) What is the time frame(s) for performing the tasks?
      - 4.1.2.2. The Tribes have suggested subsistence-related issues, such as
        - (a) identification and comments on subsistence use-areas,
        - (b) traditional ecological knowledge,
        - (c) species involved, and irreplaceability of particular resources,
        - (d) levels of existing competition, etc., and
        - (e) comparison of subsistence behavior and competition, on state vs. federal land, because both are in the area and the land is under respective state and federal subsistence regimes.
      - 4.1.2.3. Make certain we hear COE/EPA thoughts, so that counsel can convey to Tribes.

- 4.1.3. Are there field activities about which Tribes might help? This has cost implications. Some of the tribal members have been participating in water quality work, of which I have no detailed knowledge, but which I believe is funded by BIA or EPA. I believe that the focus has been on the Koktuli.
- 4.1.4. What sort of funding sources exist for work done by Tribes where the work product may be of assistance to a NEPA process? I understand that the COE does not have grant programs, that EPA, DOI and BIA have grant-making programs, but I not informed about the scope of such programs. What sort of programs are available at EPA? If there are available programs at DOI and BIA, is it appropriate for COE or EPA to work with the Tribes in securing such governmental funds, or non-governmental funds? COE and EPA may have other suggestions along those lines.
- 4.2. Joint-Lead Agencies
- 4.3. Closing Note: Counsel for the six Tribes are available to you to offer thoughts on matters that the Tribes have raised, but which may not be clear at first blush. An example is interplay of the 2005 BBAP and NEPA that arises under NEPA regulations.

# Corps of Engineers Regulatory Program

Dave Casey  
Kenai Field Office Supervisor  
Alaska District – Regulatory Division  
August 13, 2010



US Army Corps of Engineers  
**BUILDING STRONG**

Building and Preserving Alaska's Future

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# Brief History of Corps of Engineers

- June 1775 - George Washington establishes engineer officers to Army during American Revolution
- March 1802 – Army establishes Corps of Engineers and tasks Corps with founding and operating the U.S. Military Academy at West Point.
- 1899 – Congress passes the Rivers and Harbors Act and the Corps implements what is now one of the oldest Regulatory Programs in the United States.



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# Corps Role in Alaska

- 1867 - U.S. purchases Alaska from Russia
  - ▶ Corps explored and surveyed much of area
- 1942 - Army Engineers Construct Alaska Highway from Dawson Creek to Delta Junction and Fairbanks.
- 1946 - Alaska District Established
  - ▶ Headquartered on Elmendorf AFB
  - ▶ Staffed with ~500 civilians and several Army officers
- Colonel Reinhard Koenig is the Alaska District Commander
- Regulatory Division has staff of about 60 natural resources professionals and support staff.
  - ▶ Alaska District Headquarters is on Elmendorf Air Force Base.
  - ▶ Field Offices in Fairbanks, Juneau, Kenai, Sitka, Wasilla and Anchorage.
  - ▶ Numerous regulators have volunteered to serve in Overseas Contingency Operations.



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## Regulatory Program

- Our mission is to protect the nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions.
- 4 Goals:
  - ▶ Protect the aquatic environment
  - ▶ Enhance regulatory program efficiency
  - ▶ Make fair, reasonable, and timely decisions
  - ▶ Achieve no net loss of aquatic resources
- The Corps Regulatory Program is neither an proponent or an opponent of the projects we review for permits.



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## Six Principles Guide USACE Activities and Operations

- Meet the Trust responsibility;
- Honor the government-to-government relationship;
- Acknowledge the inherent sovereignty of Tribes;
- Engage in pre-decisional consultation;
- Protect natural and cultural resources when possible, and
- Find opportunities to use existing authorities to encourage economic capacity building and growth.



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## Jurisdiction– Sec 10 RHA

- Rivers and Harbors Act of 1899
  - ▶ Dept. of Army is authorized to issue permits for the work in or affecting the nation's Navigable waters of the United States
  - ▶ Authority is under Section 10
  - ▶ Navigable Waters – Past use, presently used, and/or susceptibility for use to transport interstate or foreign commerce.



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**Jurisdiction– Sec 404 of the Clean Water Act  
(CWA)**

- Dept. of Army is authorized to issue permits for the discharge of dredged or fill material into waters of the United States
- Authority is under Section 404 of the CWA.
- Section 404 waters of the U.S. include
  - ▶ All Section 10 waters
    - Absent wetlands, the lateral limit for coastal water bodies is the High Tide Line (HTL)
  - ▶ Rivers, most tributaries and lakes
  - ▶ Most wetlands like bogs, marshes, fens, swamps



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